VET.APP. No. 15-3014

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

GARY L. SHORT,

Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RECORD OF PROCEEDINGS INDEX

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I. ISSUE PRESENTED

Whether the Court should dismiss the appeal of the Board of Veterans Appeals' (Board) June 16, 2015, decision that awarded Appellant entitlement to special monthly compensation (SMC) based on the need for aid and attendance.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Gary L. Short, Appellant, appeals a June 16, 2015, decision of the Board that awarded him entitlement to SMC based on the need for aid and attendance. (Record Before the Agency (R.) at 1-9). Appellant argues that remand is warranted because the Board misinterpreted 38 U.S.C. § 1114 and the applicable regulations when it failed to consider whether any of Appellant's service-connected disabilities alone, other than his coronary artery disease (CAD), would entitle him to SMC. Appellant's Brief (App. Br.) at 7-13. As to be explained below, Appellant has fully assailed the full scope of the Board's decision, and in doing so, has not carried his burden of persuasion. Thus, the Court should dismiss Appellant's claim.

C. Statement of Relevant Facts

Appellant, who had active military service from May 1969 to April 1971 (R. at 2504), submitted a claim for SMC in December 2011. (R. at 1476-77 (1474-77)). In support of this claim, Appellant in October 2012 submitted an Examination for Housebound Status or Permanent Need for Regular Aid and Attendance form. (R. at 1339-40). VA informed Appellant in July 2013 that his claim for entitlement to SMC based on housebound criteria was granted, but denied based on aid and attendance. (R. at 804-16). A notice of disagreement (NOD) was received in August 2013. (R. at 798-801). A statement of the case (SOC) was issued in November 2013. (R. at 749-71). His substantive appeal was received in December 2013. (R. at 721 (720-21)). He provided testimony

before a Veterans Law Judge in January 2014. (R. at 535-48). Appellant submitted another NOD form in July 2014. (R. at 625-27).

Prior to Appellant's claim being adjudicated by the Board, a rating decision dated in May 2015 reflects that Appellant has been awarded service connection for (1) post-traumatic stress disorder (PTSD), which is rated at 100 percent, effective from February 19, 2008; (2) CAD, which is rated at 100 percent, effective from September 28, 2012; (3) bilateral hearing loss, which is rated at 20 percent, effective from June 22, 2011; (4) tinnitus, which is rated at 10 percent, effective from April 23, 2004; (5) hypertension, which is rated at 10 percent, effective from November 14, 2008; (6) residuals of trauma to the left interphalangeal joint (IPJ) hallux, claimed as left foot condition, which is rated at 10 percent, effective from November 26, 2014; and (7) erectile dysfunction (ED) associated with PTSD and major depressive disorder (MDD), which is non-compensable, effective from November 7, 2008. (R. at 86-87 (69-79, 83-88)). Additionally, in this rating decision, Appellant was awarded entitlement to a total disability rating for individual unemployability based on service-connected disability (TDIU) from April 23, 2004, and he has a combined evaluation of 100 percent, effective from February 19, 2008. (R. at 87). Appellant was also awarded SMC "under 38 U.S.C. [§] 1114, subsection (k) and 38 C.F.R. [§] 3.350(a) on account of loss of use of a creative organ from 11/07/2008," and "under 38 U.S.C. [§] 1114, subsection (s) and 38 CFR [§] 3.350(i) on account of coronary artery disease rated 100 percent[,] and additional service-connected

disabilities of bilateral hearing loss, post-traumatic stress disorder; major depressive disorder, tinnitus, independently ratable at 60 percent or more from 09/28/2012." (R. at 87).

Thereafter, on June 16, 2015, the Board awarded Appellant SMC based on the need for aid and attendance. The Board determined that SMC based on the need for regular aid and attendance was warranted because the evidence of record "indicates that the Veteran is incapable of performing activities of daily living without the assistance of another person due to his service-connected cardiac and psychiatric disabilities." (R. at 5 (1-9)). Thereafter, Appellant filed an appeal to the Court. (R. at 1-9).

III. SUMMARY OF THE ARGUMENT

The Court should dismiss this appeal because there is no case or controversy where Appellant's award of SMC is a full grant of his requested benefit, based on the Board decidedly determining that his aid and attendance was required due to his service-connected cardiac and psychiatric disability.

IV. ARGUMENT

The Court should dismiss Appellant's appeal because there is no case or controversy.

This Court has adopted the jurisdictional restrictions of the case-or-controversy rubric under Article III of the Constitution of the United States. *See Aronson v. Brown*, 7 Vet.App. 153, 155 (1994); *Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990). "When there is no case or controversy, or when a once live case

or controversy becomes moot, the court lacks jurisdiction." *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order). Thus, when the relief sought by an appeal has been accomplished, the appropriate course of action is for the Court to dismiss the appeal as moot. *Id.*

In the June 2015 Board decision, the Board granted Appellant entitlement to SMC based on the need for regular aid and attendance under 38 U.S.C. § 1114(l) and 38 C.F.R. § 3.350(b)(3). (R. at 1-7). SMC is payable where a Veteran, as a result of a service-connected disability, is bedridden or has such significant disabilities so as to need the regular aid and attendance of another person. 38 U.S.C. § 1114(l); 38 C.F.R. §§ 3.350(b). In determining the need for regular aid and attendance, the Board must consider, *inter alia*, "incapacity, physical or mental, [that] requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment." 38 C.F.R. § 3.352(a) (2015); *see also Turco v. Brown*, 9 Vet.App. 222, 224 (1996) (holding that "eligibility requires at least one of the enumerated factors be present").

The Court reviews the Board's determination regarding entitlement to SMC under the "clearly erroneous" standard. *Breniser v. Shinseki*, 25 Vet.App. 64, 68 (2011). "'A finding is "clearly erroneous" when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Gilbert v. Derwinski*,

1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The RO's determination as to compensation levels and effective dates are generally considered "downstream" elements of a claim, which can be appealed only by filing a new NOD after the underlying benefit has been granted and an effective date assigned: this has been called the "downstream element rule." *See Grantham v. Brown*, 114 F.3d 1156, 1158–59 (Fed. Cir. 1997) (an NOD with respect to service-connectedness cannot initiate appellate review of the downstream element of compensation level); *Holland v. Gobe*r, 10 Vet.App. 433, 436 (1997) (holding that an RO's grant of service connection during the appellate process is "a full award of benefits on the appeal initiated by [the first NOD]" and any disagreement with the disability rating or effective date required a separate NOD to place those elements or issues in appellate status).

Here, in determining whether Appellant was entitled to SMC, the Board determined that "the Veteran is unable to perform his activities of daily living and protect himself from his environment without regular assistance from another person due to his service-connected cardiac ***and*** psychiatric disabilities." (R. at 3 (1-7) (emphasis added)). Significantly, the Board noted that Appellant was already in receipt of SMC at the housebound rate (and that he was specifically seeking SMC based on the need for aid and attendance. (R. at 4 (1-7) (discussing R. at 804-21 (July 2013 rating decision))). No other claim was raised by Appellant as to SMC, and inspection of his VA Form 21-0958, NOD, reveals

that he specifically stated that the issue that he disagreed with was "Aid & Attendance." (R. at 798 (798-801)). Additionally, on this form, Appellant in checking the area of disagreement, put an "X" in the box for "Service Connection," and did not check "Evaluation of Disability." (R. at 798 (798-801)). Given such, the only issue on appeal was whether Appellant was entitled to SMC based on aid and attendance. It was granted by the Board, and the rating level and effective date were effectuated in a subsequent rating decision.[1] Thus, there is no case or controversy before the Court. Furthermore, Appellant's claim is moot, where it appears he is receiving the highest rating possible based on the facts of his case. Indeed, the only issue in the Board's decision, having been favorably decided, is beyond the reach of the Court's jurisdiction. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

Appellant asserts otherwise, arguing that the Board had a duty to assess whether he was entitled to SMC based on individual service-connected disabilities. In other words, he states that the "Board failed to analyze his service-connected disabilities separately, rather than together, for purposes of establishing the need for aid and attendance." App. Br. at 11. The Court should find this argument unavailing where Appellant has not presented any evidence to

[1]Subsequent to the Board awarding Appellant a full grant of his claimed benefit, the RO effectuated the Board's decision in an August 13, 2015, rating decision, where the RO assigned Appellant a rating and an effective date – downstream elements based on the evidence. The rating was changed to a higher rating of "l" from "s" under 38 U.S.C. § 1114, subsection (l) and 38 C.F.R. § 3.350(b), effective from November 7, 2008. Appellant, if he disagrees with the SMC rating, should submit an NOD.

demonstrate that the Board's decision was clearly erroneous as to finding that his need for regular aid and attendance was based on Appellant's service-connected CAD as well as his service-connected PTSD. Notably, Appellant relies upon his examination for housebound status or permanent need for regular aid and attendance form, dated in October 2012, as well as his wife's testimony to demonstrate that CAD alone causes his need for regular aid and attendance. App. Br. at 11; (R. at 1339-40, 537-42 (535-48)).

Upon review of the aforementioned evidence, neither piece of it suggests such a finding. (R. at 1339-40, 537-42 (535-48)). Of course, Appellant's simply saying that his CAD alone causes his need for regular aid and attendance does not mean that it is so. *See Stolt-Nielson S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 675 n7 (2010) ("[M]erely saying something is so does not make it so."). On the contrary, the Board specifically explained that its decision was based on the aid-and-attendance report, and in answer to what disabilities restrict his listed activities/functions, the report reflects "ACUTE MI, PTSD, NEUROPATHY," which is consistent with the Board's finding that his CAD and his psychiatric disability together contribute to his need for regular aid and attendance. (R. at 1339 (1339-41)). Indeed, the Board specifically stated:

> However, the evidence of record, which includes a VA Aid and Attendance examination report from October 2012 and the Veteran's and his wife's Board hearing testimony from January 2015, indicates that the Veteran is incapable of performing activities of daily living without the assistance of another person due ***to his service-connected cardiac and psychiatric disabilities***. 3 8 U.S.C.A. § 1114(l); 38 C.F.R. § 3.350(b)(3). According to the October 2012

> VA Aid and Attendance examination report, the Veteran's cardiac condition, PTSD, and neuropathy restricted his activities.

(R. at 5 (1-7) (emphasis added)). Under these circumstances, Appellant's argument cannot be sustained.

Importantly, this claim was not an implied claim as part of an increased rating claim, as stated by Appellant (App. Br. at 11-12), but, rather, a claim raised directly by Appellant in a December 2011 statement in support of claim. (R. at 1475, 1339-40); *see Akles v. Derwinski*, 1 Vet.App. 118, 121 (1991) (recognizing entitlement to SMC as an "inferred issue" in a claim for an increased evaluation).[2] Given such, Appellant's reference to VA's adjudication manual is inapplicable. All in all, there was no other issue before the Board, and the Board clearly determined that Appellant's need for regular aid and attendance was based on his service-connected PTSD and CAD. *See* Finding of Fact (R. at 3 (1-7)); *see also* (R. at 5 (1-7)). Thus, Appellant was awarded a full grant of the benefit, and the Court should dismiss the appeal.

V. CONCLUSION

In view of the foregoing, the Secretary respectfully requests that the Court dismiss the appeal of the June 16, 2015, Board decision.

Respectfully submitted,

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[2] This, of course, is a misuse of the word "inferred," which should mean that the RO inferred a claim based on what the record implied.

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